IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANN MORGAN ZIMMERER
AND GERALD LEE ZIMMERER,

Appellants,

v.

No. 34269

MARK E. ROMANO, ROBIN J.
ROMANO, AND WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Appellees.

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BRIEF OF APPELLEE, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS

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STATEMENT OF FACTS

This case involves a property dispute over 20.29 acres of land encumbered by one or more right-of-way easements granted to the West Virginia Division of Highways (hereinafter the "DOH") by the Nicholas County Circuit Court through an eminent domain proceeding in 1971.[1] At that time, an 82.65-acre tract of land was owned by the Hill family, specifically four children of James William Hill, Sr., who had died a year earlier.[2] The 20.29 acre right of way easement was acquired for the purpose of constructing Corridor L, U.S. Route 19, which connects Interstate 77 in Beckley with Interstate 79 near Sutton. Although the 20.29 acres was primarily acquired for the construction of US Route 19, which was completed as planned, the easement was also utilized by the DOH in order to construct an access road to allow property owners with land near the then newly constructed U.S. Route 19, including the Hills, the Zimmerers, and others, and, subsequently, the Romanos, to access the new Route 19. Given the intended purpose of the access road, the easement in the vicinity of the access road was and is a non-controlled access right of way, and the access road has been and continues to be used to provide access to several tracts of land.

At the request of the Romanos, who expressed interest in purchasing a portion of the right of way abutting their land if it were deemed excess property, the local district office of the DOH investigated the status of the non-controlled right of way originally acquired from the Hills. The district DOH office concluded that no future construction was anticipated, and that part of the previously acquired right of way might thus be eligible for sale. A 1.18-acre strip of land

[1] Final Order dated August 18, 1971 (recorded in Nicholas County Deed Book 238 at Page 691) Plaintiffs Motion for Reconsideration, Exhibit 7.

[2] Will of James William Hill, Sr., of January 22, 1968, probated on February 2, 1970 (of record in

adjacent to the public access road was identified as potentially excess. At one end of this strip is the U.S. Route 19 controlled access right of way, while the opposite end is at the Zimmerer property line. One long side of the strip runs along and abuts the access road, which road runs to the Zimmerer property, while the opposite long side runs along and abuts what is now the Romano property, but which was formerly the Hill property from which the DOH originally acquired its easement.

The district DOH office concluded that the only access to a public road that the Romano property has is over and across the 1.18-acre strip of land, while the Zimmerers do not need to utilize the 1.18-acre strip to access their property. The DOH district office considered the Romano request in the belief that it had both an obligation to preserve the sole access of property owners such as the Romanos, as well as the discretion to sell property with multiple abutting landowners to a particular abutting landowner where the property sold was the sole means of access to the land owned by that particular abutting landowner. Consistent with that understanding, the district office determined that the 1.18-acre strip could properly be declared to be excess property and sold to the Romanos. That understanding of the law on the part of the DOH district office informs and is reflected in the rulings of the trial court in regard to this matter.

CONCISE STATEMENT MEETING ALLEGED ERRORS

Appellants, Ann Morgan Zimmerer and Gerald Lee Zimmerer, appeal a Final Order, entered by the Circuit Court of Nicholas County, awarding summary judgment in favor of the Appellees, Mark E. Romano and Robin J. Romano, and the DOH. The parties in this case, by

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Nicholas County Will Book 008 at Page 108), Plaintiffs' Motion for Reconsideration, Exhibit 5.

mutual agreement, submitted their respective motions for summary judgment to the Circuit Court, which found that the DOH had properly transferred to the Romanos its interest in a 1.18-acre right of way, which easement was originally a portion of a 20.29-acre right of way acquired for public road purposes.

Although the DOH has no direct interest in the dispute between the Zimmerers and the Romanos as to certain land ownership rights at issue in this matter, the actions of the DOH in relation to its right of way, the sale of excess property, and the property at issue were based upon a belief and understanding of the facts and the applicable law consistent with the findings and conclusions of the Circuit Court. Thus, the DOH believes that the Circuit Court's rulings as to the respective ownership rights, if any, of the Zimmerers and the Romanos were correct.

In response to the Appellants' contention that they are "principal abutting landowners" pursuant to W. Va. Code §17-2A-19, and that the Circuit Court erred in determining that they were not principal abutting landowners, the DOH states that the Circuit Court was correct in its determination. The Zimmerers are not principal abutting landowners since they admit that they are not the persons from whom the right of way at issue was originally acquired by DOH, nor are they the spouses or the descendants of those persons. The definition of "principal abutting landowner" is plainly and clearly set forth in the Code and the Appellants do not meet it.

The Circuit Court's ruling relies in part on the conclusion that the DOH has sufficient discretion to sell excess property to a particular abutting landowner, in a situation where there are multiple abutting landowners, if the sale to a particular abutting landowner is the only disposition of the excess property that would preserve that landowner's sole access to a public road.

Accordingly, the Court concluded that the Division of Highways acted properly and within its discretion in selling the 1.18 acre right of way to the Romanos.

POINTS AND AUTHORITIES RELIED UPON

I. The actions of the DOH in this matter rely upon the findings and conclusions of the trial court as they relate to ownership of the property claimed by the Zimmerers and the Romanos.

II. The Appellants are not "principal abutting landowners" pursuant to W. Va. Code § 17-2A-19.

W. Va. Code § 17-2A-19

Black's Law Dictionary (6th Edition 1990)

III. If the DOH does not have discretion to sell property to a particular abutting landowner in order to comply with W. Va. Code § 17-4-47(b), the right of way at issue would not be determined by the DOH to be excess and would not be subject to sale.

W. Va. Code § 17-4-47

ARGUMENT

I. THE ACTIONS OF THE DOH IN THIS MATTER RELY UPON THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT AS THEY RELATE TO OWNERSHIP OF THE PROPERTY CLAIMED BY THE ZIMMERERS AND THE ROMANOS.

While the other parties to this matter clearly dispute the ownership of the fee interest underlying the 20.29-acre right of way acquired by the DOH, the DOH has not taken a position on this issue.[3] However, it should be noted that, upon review of the relevant deeds,[4] the DOH

[3] The laws and regulations regarding the disposition of excess property and rights of way include no apparent reference to the status of the owner of an underlying fee, nor does it appear that the Legislature considered the effect that restricting the DOH to only a right-of-way easement, as opposed to a fee simple interest, would have in situations such as this. The language of West Virginia Code §17-2A-19 gives preference only to abutting landowners.

[4] Deed dated April 6, 1995 of record in Nicholas County Deed Book 362 at Page 809, attached as Exhibit 6 to Plaintiffs Motion for Reconsideration, and Deed dated December 9, 1998, of recorded in

district office concluded, as did the Circuit Court, that there was no reservation of the fee interest by either the Hill heirs or Greenwood Timber. To the contrary, the DOH determined that the deeds at issue contained only a reservation of that interest which was conveyed to the DOH, i.e., one or more right-of-way easements on a total of 20.29 acres. The DOH therefore concluded that the rights to the underlying fee, having not been reserved, transferred with the remaining property through Greenwood Timber and to the Romanos.

II. THE APPELLANTS ARE NOT "PRINCIPAL ABUTTING LANDOWNERS" PURSUANT TO W. VA. CODE 17-2A-19.

Pursuant to W.Va. Code § 17-2A-19(c)(3)(A), a "principal abutting landowner" is to be given preferential treatment[5] where the DOH has determined that real property previously acquired by the DOH for use as a highway should be sold "as not necessary for highways purposes" and the primary use of the property abutting the acquired property has not changed since the time of the acquisition. The term "principal abutting landowner" is specifically and expressly defined in the statute as "an individual from whom the real estate was acquired or his or her surviving spouse or descendant." W.Va. Code § 17-2A-19(c)(3)(A)(i) (West 2002). The term "descendant" is specifically defined by reference to W. Va. Code § 42-1-1, which reads in pertinent part as follows: "'Descendant' of an individual means all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code." W. Va. Code § 42-1-1(5) (West 2002).

Nicholas County Deed Book 388 at Page 748, attached as Exhibit 59 to Plaintiff's Motion for Reconsideration.

[5] The preferential treatment to be given to a principal abutting landowner is specified in W.Va. Code § 17-2A-19(c)(3)(B) as the opportunity to purchase the property from the DOH for the amount of the original acquisition price paid by the DOH. The statute requires the DOH to reduce the price to reflect the lost value of any improvements that have been removed from the property, and gives the DOH the option to adjust the price to reflect an increase in the Consumer Price Index.

The term "surviving spouse" is similarly defined as follows: "'Surviving spouse' means the person to whom the decedent was married at the time of the decedent's death." W. Va. Code § 42-1-1(39) (West 2002).

The Appellants make no claim that the DOH acquired the property at issue from them, nor do they claim to be the descendants or the surviving spouses of the individuals from whom the property was originally acquired by the DOH. To the contrary, the Appellants go to great lengths to argue that the plain language and obvious intent of § 17-2A-19(c)(3)(A) should be ignored, and that they be deemed to be principal abutting landowners, even though they are, at most, mere assigns, and not descendants or surviving spouses. Although Appellants claim to be examining the statute in its entirety, in reality, in order to support their argument, they focus on a single phrase, ignore its context, and attempt to distort the plain meaning of the relevant language.

West Virginia Code § 17-2A-19(c)(2) requires that the DOH propose legislative rules "governing and controlling the making of any leases or sales" of property held by the DOH. It should be immediately noted that § 17-2A-19(c)(2), unlike § 17-2A-19(c)(3)(A), refers not only to sales of property but to leases. Appellants fail to quote the single sentence, upon which they purport to rely, in its entirety, choosing instead to extract the phrases that they favor. The complete sentence reads as follows:

> The **rules <u>may</u> provide for the giving of preferential treatment <u>in making leases</u> to** the person from whom the properties or rights or interests were acquired, or their heirs or **assigns** and shall also provide for granting a right of first refusal to abutting landowners at fair market value in the sale of any real estate or any interest or right in the property, owned by the division of highways.

W.Va. Code § 17-2A-19(c)(2) (West 2002) (emphasis added). Thus, the linchpin of Appellants' argument that mere assigns were intended to have a status identical to that of surviving spouses and descendants, is the fact that the DOH will promulgate a legislative rule that may, or may not, at the discretion of the DOH, give some unspecified form of preferential treatment, in the making of leases, to the assigns of the person from whom the DOH acquired the property.

The Appellants' method of analysis flatly contradicts the exact principle of statutory analysis that the Appellants claim to follow, i.e., review of the entire statute. The statute, as a whole, sets forth the requirements that the DOH must follow in selling, exchanging, and leasing land under a variety of conditions. The statute, as a whole, is not devoted to the definition of the "principal abutting landowner" or to the nature of the preferential treatment accorded persons with that status. Those portions of the statute that provide for special treatment for principal abutting landowners refer only to the sale of land. Considering the statute as a whole, there is no reasonable basis to conclude that a single sentence relating to the type of rules that the DOH might choose, or not, to adopt, in relation to leases of property, is intended to provide some obscure form of guidance as to the construction and meaning of the statute's provisions relating to the sale of land to a principal abutting landowner.

The term "principal abutting landowner" is clearly and carefully defined in § 17-2A-19(c)(3)(A)(i), and it does not include assigns. Further, adding the term "assigns" would erase the distinction between a "principal abutting landowner" and an "abutting landowner." The term "assigns," as it is normally used, "generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law." Black's Law Dictionary 119 (6th Edition 1990). Thus, the Appellants' approach would broaden the definition of "principle abutting landowner" out of existence. This makes no sense in the context of the statute as whole.

Appellants isolate and torture a single sentence of a single subsection of the relevant statute in an attempt to avoid the effect of the plain language of a subsequent subsection. The Circuit Court was correct in its determination that the Appellants were not "principal abutting landowners, and its ruling in that regard should be affirmed.

III. IF THE DOH DOES NOT HAVE DISCRETION TO SELL PROPERTY TO A PARTICULAR ABUTTING LANDOWNER IN ORDER TO COMPLY WITH W. VA. CODE § 17-4-47(b), THE RIGHT OF WAY AT ISSUE WOULD NOT BE DETERMINED BY THE DOH TO BE EXCESS AND WOULD NOT BE SUBJECT TO SALE.

The order granting summary judgment to the Romanos specifically finds that both the Romanos and Ann Morgan Zimmerer are abutting landowners relative to the property conveyed to the Romanos by the DOH. (Order dated June 4, 2007, ¶¶ 8-9 at 3-4, ¶ 2 at 4). Contrary to the Appellants' arguments, prior to the transaction at issue between the DOH and the Romanos, the property conveyed to the Romanos constituted a non-controlled access right of way and could thus be utilized by the Romanos for public road access. Given that the Romanos had access to a public road, West Virginia Code § 17-4-47(b) and the applicable case law requires that the Romanos retain their sole means of access. Were the Romanos to be deprived of reasonable access, the loss of access would be compensable in eminent domain. The determination by DOH that property is or is not excess, and thus subject to sale as surplus property, includes consideration of the property's status as a means of access to a public road. Property that is held by the DOH will not be deemed excess property, subject to sale, if that property provides the only public road access available to an abutting landowner.

Here, as indicated in the trial court's order, the DOH acted in the belief that it retained at least minimal discretion, to sell property to a particular abutting landowner, where that abutting landowner relied upon the property at issue for access to a public road. If the Court concludes that the DOH has no such discretion in cases involving multiple abutting landowners with potentially conflicting interests, it appears that the conveyance to the Romanos may properly be deemed an *ultra vires* act that was contrary to the applicable law, and thus be rendered null and void. The DOH would then reconsider its determination that the right of way at issue is excess. In the absence of discretion, and based upon the facts and circumstances as they are presently understood by the DOH, it would be determined that the right of way at issue is not excess property, and that the property would not be subject to sale to any person.

RELIEF PRAYED FOR

Based upon the foregoing, the Appellee, West Virginia Department of Transportation, Division of Highways, respectfully requests that the order of the Circuit Court of Nicholas County be affirmed.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS.

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CERTIFICATE OF SERVICE

I, G. Alan Williams, do hereby certify that on the 6th day of November, 2008, I did serve the foregoing Response Brief of Appellee. West Virginia Department of Transportation, Division of Highways, upon the following individuals by mailing a true copy of the same to them, First Class United State Mail, postage prepaid, and addressed as follows:

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